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10 Counterclaimant Hartford Fire Insurance Co.*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MASON AND DIXON INTERMODAL, INC.

Plaintiff,

v.

LAPMASTER INTERNATIONAL, LLC and
HARTFORD INSURANCE CO.

Defendants.

HARTFORD FIRE INSURANCE CO,
individually and as subrogee of Lapmaster
International, LLC,

Counterclaimant,

v.

MASON AND DIXON INTERMODAL, INC.

Counterclaimant.

Case No. CV-08-1232-MEJ

**ANSWER OF DEFENDANT HARTFORD FIRE INSURANCE COMPANY,
ERRONEOUSLY SUED AS HARTFORD INSURANCE CO., TO MASON AND DIXON INTERMODAL, INC.'S COMPLAINT FOR DECLARATORY JUDGMENT; AND HARTFORD FIRE INSURANCE COMPANY'S COUNTERCLAIMS AGAINST MASON AND DIXON INTERMODAL, INC.**

Defendant HARTFORD FIRE INSURANCE COMPANY, erroneously sued as Hartford Insurance Co. ("Hartford" or "Defendant"), answers the Complaint of Mason and Dixon Intermodal, Inc. ("MDII") and alleges Counterclaims as follows:

ANSWER TO "JURISDICTION AND VENUE"

1. Defendant denies each and every allegation in the Complaint that is not expressly admitted herein.
2. Answering Paragraph 1, Defendant admits the allegation in that Paragraph.

3. Answering Paragraph 2, Defendant admits the allegation in that Paragraph.
4. Answering Paragraph 3, Defendant admits the allegation in that Paragraph.

ANSWER TO “PARTIES” ALLEGATIONS

5. Answering Paragraph 4, Defendant lacks sufficient information or belief to admit or deny the allegations as to MDII, and on that ground, denies the allegations.

6. Answering Paragraph 5, Defendant admits the allegations in that Paragraph.

7. Answering Paragraph 6, Defendant admits the allegations in that Paragraph.

8. Answering Paragraph 7, Defendant admits the allegations in that Paragraph.

9. Answering Paragraph 8, Defendant admits the allegations in that Paragraph.

10 10. Answering Paragraph 9, Defendant admits the allegations in that Paragraph, but
11 contends that Hartford Fire Insurance Company is the proper party. Hartford Fire Insurance
12 Company is a corporation organized under the laws of the State Connecticut, with its principle
13 place of business located in Connecticut.

14 11. Answering Paragraph 10, Defendant denies the allegations insofar as the allegation
15 is not accurate. Hartford, after indemnifying its insured, Lapmaster International, LLC
16 (“Lapmaster”), is subrogated to the rights of Lapmaster pursuant to the doctrines of contractual
17 and equitable subrogation. Hartford is seeking recovery for damage to a Precision Flat Polishing
18 Machine and a Precision Flat Lapping Machine (“the Machines”) caused by the act and omissions
19 of Plaintiff and Third-Party Defendants.

ANSWER TO “BACKGROUND ALLEGATIONS”

22 12. Answering Paragraph 11, Defendant denies the allegations. In December, 2007,
23 the Machines were shipped by Hamia Co., Ltd. in Tokyo, Japan from the Yokohama, Japan port.
24 *See* Nippon Express Waybill (“Port of Loading”), a true and correct copy of which is attached as
25 Exhibit A and incorporated by reference. The place of delivery was Oakland, California. *See*
26 Exhibit A referencing “Port of Discharge” and “Place of Destination”.

13. Answering Paragraph 12, Defendant admits that Nippon Express issued the

1 Waybill, but lack sufficient information or belief to admit or deny the remaining allegations, and
2 on that ground, denies the allegations.

3 14. Answering Paragraph 13, Defendant denies the allegations. Nippon Express was
4 not involved in arranging for the ground transportation.

5 15. Answering Paragraph 14, Defendant denies the allegations.

6 16. Answering Paragraph 15, Defendant denies the allegations.

7 17. Answering Paragraph 16, Defendant lacks sufficient information or belief to admit
8 or deny the allegations as to who prepared the Waybill, and on that ground, denies the allegations.

9 18. Answering Paragraph 17, Defendant admits the allegations in that Paragraph
10 inasmuch as MDII transported the Machines from the Port of Oakland. However, the
11 transportation was never completed because MDII trucks crashed into overpasses.

12 **ANSWER TO "COUNT ONE"**

13 19. Answering Paragraph 18, Defendant incorporates by reference their answers to all
14 Paragraphs above.

15 20. Answering Paragraph 19, Defendant denies the allegations.

16 21. Answering Paragraph 20, Defendant denies the allegations.

17 22. Answering Paragraph 21, Defendant denies the allegations.

18 23. Answering Paragraph 22, Defendant admits that Plaintiff has requested a judicial
19 determination of the rights and duties of the parties. Defendant denies the remaining allegations in
20 Paragraph 22, and specifically denies that MDII's liability is limited to \$500.00 for each Machine
21 MDII permanently damaged.

22 **ANSWER TO "COUNT TWO"**

23 24. Answering Paragraph 23, Defendant incorporates by reference their answers to all
24 Paragraphs above.

25 25. Answering Paragraph 24, Defendant denies the allegations. Third-Party
26 Defendants knew and communicated to MDII the dimensions of the Machines.

27 26. Answering Paragraph 25, Defendant denies the allegations. Third-Party

1 Defendants knew and communicated to MDII the dimensions of the Machines. MDII, as a "motor
 2 carrier engaged in the performance of intermodal trucking services," knew or should have known
 3 the load it was carrying exceeded the height of the overpasses. MDII actions/inactions were the
 4 direct cause of the impact between the Machines and the overpasses.

5 27. Answering Paragraph 26, Defendant denies the allegations. Third-Party
 6 Defendants knew and communicated to MDII the dimensions of the Machines. MDII, as a "motor
 7 carrier engaged in the performance of intermodal trucking services," knew or should have known
 8 the load it was carrying exceeded the height of the overpasses.

9 28. Answering Paragraph 27, Defendant denies the allegations.

10 29. Answering Paragraph 28, Defendant denies the allegations, and specifically denies
 11 that they are responsible to indemnify and reimburse MDII for the physical harm, damage, and
 12 liability caused by MDII's transport of the Machines.

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AFFIRMATIVE DEFENSES

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FIRST AFFIRMATIVE DEFENSE

16

(Contractual Liability)

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Under the terms of the written agreements between Plaintiff and Defendants, Plaintiff is
 not entitled to a declaration of non-liability or to any defense and indemnity from Defendants.
 Instead, under the terms of the agreements, Defendants are entitled to recover from Plaintiff for
 cargo damage and other damages, losses and expenses arising out of the matters referred to in the
 Complaint.

22

SECOND AFFIRMATIVE DEFENSE

23

(Failure to Safely Deliver Cargo)

24

Under the agreements, Plaintiff was required to use due diligence to provide safe transport
 and delivery of the cargo from Oakland, California to Fremont, California. Plaintiff failed to use
 such due diligence, failed to perform the terms and conditions of the agreements, failed to safely
 deliver the cargo, and damaged the cargo through its own conduct and/or the conduct of its agents

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1 or subagents, all in violation of requirements of the agreements and applicable laws.

2 **THIRD AFFIRMATIVE DEFENSE**

3 **(Limitation of Liability Not Applicable)**

4 Plaintiff is not entitled to limitation of liability under the carriage of Goods by Sea Act,
5 ("COGSA"), 46 U.S.C. §§ 1300, et seq., with regard to the damages claimed by Defendants.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Failure to State a Cause of Action)**

8 Defendant alleges that the Complaint in its entirety fails to state facts sufficient to
9 constitute a cause of action as against these answering Defendants.

10 **FIFTH AFFIRMATIVE DEFENSE**

11 **(Liability for Acts of Agents or Subagents)**

12 Plaintiff is responsible in contract and tort for all damage to cargo and other damages,
13 losses and expenses resulting from its conduct.

14 **SIXTH AFFIRMATIVE DEFENSE**

15 **(Negligence of Principal or Agent)**

16 Plaintiff, and/or its agents or subagents, failed to exercise due care in the transportation of
17 the cargo, which proximately caused the damage to the cargo, and the other damages, losses and
18 expenses referred to in the Complaint.

19 **SEVENTH AFFIRMATIVE DEFENSE**

20 **(Negligence or Fault of Third Parties)**

21 The damage to cargo and other damages, losses and expenses referred to in the Complaint
22 were proximately caused by, or contributed to, by the conduct of third parties for which Defendant
23 is not responsible.

24 **EIGHTH AFFIRMATIVE DEFENSE**

25 **(Carrier Burden as to Load and Stowage)**

26 The cargo was received by Plaintiff from the shipper in apparent good order and condition.
27 The cargo was damaged en route from Oakland to Fremont in an accident(s). The cargo was

1 damaged and destroyed. Defendants have therefore established a *prima facie* case of liability, and
2 Plaintiff has the burden of proof to demonstrate any alleged defects in loading or stowage.

3 NINTH AFFIRMATIVE DEFENSE

4 (Proper Description of Cargo)

5 The Waybill and Import Dispatch properly identified the cargo and its measurements. The
6 cargo was properly marked. Plaintiff, and its agents or subagents, were therefore on notice at all
7 times as to the nature of the cargo and the precautions required by the carrier.

8 TENTH AFFIRMATIVE DEFENSE

9 (Contributory or Comparative Fault of Carrier)

10 The cargo damage and the damages, losses and expenses referred to in the Complaint were
11 proximately caused, wholly or in part, by the negligence or fault of MDII, and/or its agents or
12 subagents.

13 ELEVENTH AFFIRMATIVE DEFENSE

14 (Lack of Causation)

15 No acts, omissions or other conduct of Defendants, or of any other persons or parties
16 attributable to Defendants, proximately caused or contributed to the cargo damage or other
17 damages, losses and expenses referred to in the Complaint.

18 TWELFTH AFFIRMATIVE DEFENSE

19 (Mitigation of Damages)

20 Defendants at all times acted properly to mitigate damages resulting from or incurred in
21 connection with the accident(s) referred to in the Complaint.

22 THIRTEENTH AFFIRMATIVE DEFENSE

23 (Assumption of Risk)

24 Plaintiff assumed the risk of the losses and damages resulting from the accident(s) referred
25 to in the Complaint.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Improper Party and/or Absence of Indispensable Party)

Hartford alleges that ITG Transportation Services, Inc. and West Forwarding Services are the proper party Defendants. In the event this allegation is incorrect, and if affiliates or subsidiaries of Third-Party Defendants are the proper parties, then there is, or may be, an improper party, absence of the real party in interest, or absence of an indispensable party for assertion of Plaintiff's claims.

FIFTEENTH AFFIRMATIVE DEFENSE

(Waiver)

10 Defendant is informed and believes, and thereon alleges, that Plaintiff has engaged in
11 conduct that constitutes a waiver of rights under the contract alleged. By reason of such waiver,
12 Defendants are excused from further performance of the obligations under the alleged contract.

SIXTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

15 Defendant is informed and believes, and thereon alleges, that by reason of the conduct of
16 Plaintiff which constitutes a breach of contract, tortious conduct, waiver, unclean hands and
17 laches, Plaintiff is estopped to assert a right to relief against this answering Defendant.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Release)

20 Defendant is informed and believes, and thereon alleges, that the Plaintiff's actions
21 constitute a full release and waiver of any and all claims which may have existed against this
22 answering Defendant.

NINETEENTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

25 The Complaint is barred because the Plaintiff would be unjustly enriched if it prevailed on
26 its Complaint.

TWENTIETH AFFIRMATIVE DEFENSE

(Lack of Consideration)

3 Each of the causes of action contained in the Complaint is barred by failure of
4 consideration.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Laches)

7 Defendant is informed and believes, and thereon alleges, that Plaintiff unreasonably
8 delayed bringing suit against this Defendant, thereby prejudicing Defendants' rights. Therefore, all
9 of the equitable causes of action of the Complaint are barred by the Doctrine of Laches.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Unclean Hands)

12 Defendant is informed and believes, and thereon alleges, that Plaintiff engaged in
13 inequitable conduct, which conduct constitutes unclean hands, and by engaging in said conduct,
14 Plaintiff is, therefore, barred from seeking equitable relief upon such causes of action contained in
15 Plaintiff's Complaint.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Breach of Obstruction)

18 Defendant alleges that Plaintiff is barred from recovery against this Defendant because of
19 its failure to fulfill its contractual obligations to this Defendant, which duties, promises, and
20 contractual obligations it breached and anticipatorily repudiated, thereby excusing non-
21 performances, if any, by the Defendants.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Breach)

24 Plaintiff is barred from any recovery because of its failure to fulfill its contractual
25 obligations to this answering Defendant.

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TWENTY FIFTH AFFIRMATIVE DEFENSE

(Violation of Duty of Good Faith)

Defendant alleges that Plaintiff's actions have not been brought in good faith and are frivolous. Therefore, the Defendants are entitled to reasonable expenses and attorney's fees incurred in defending this suit.

TWENTY SIXTH AFFIRMATIVE DEFENSE

(Reservation of Right to Amend)

Defendant hereby expressly reserves the right to supplement or amend these affirmative defenses predicated upon the discovery of additional issues or facts that may arise in the course of discovery in preparation for trial in this matter.

RELIEF REQUESTED

THEREFORE, Defendant requests the following relief in its Answer:

A. That the Court declare the respective rights and duties of the parties under the agreements and applicable law, but deny Plaintiff any affirmative relief and, instead, declare Defendant entitled to complete recovery for cargo damage and other damages, losses and expenses arising out of the accident referred to in the Complaint and Counterclaims;

B. That the Court award Defendant attorneys' fees and costs to the extent allowed by the written agreements and applicable law;

C. That the Court declare Defendant entitled to recover from Plaintiff under the written agreements and applicable law;

D. For costs of suit; and

E. For such other legal or equitable relief as the Court deems proper.

COUNTERCLAIMS OF HARTFORD

Defendant and Counterclaimant, Hartford Fire Insurance Company, erroneously sued as Hartford Insurance Co. ("Hartford"), alleges the following Counterclaims against Counter-defendant Mason and Dixon Intermodal, Inc. ("MDII"):

JURISDICTION AND VENUE

2 1. Jurisdiction of these Counterclaims is based on 28 U.S.C. §§ 1331 and 1333, in that
3 the Counterclaims relate to cargo damage and present a federal question under federal common
4 law and/or federal statutes. This Court also has jurisdiction over the claims for declaratory relief
5 under 28 U.S.C. § 2201. This Court also has supplemental jurisdiction over Defendants' State law
6 claims against MDII because these claims result from a common nucleus of operative facts and
7 relate to the federal claims alleged in the Complaint and Counterclaims.

8 2. Hartford is informed and believes and on that basis alleges that this Court also has
9 jurisdiction of these Counterclaims based on diversity of citizenship, in that this is a civil action
10 between citizens of different States and the amount in controversy exceeds \$75,000, exclusive of
11 interest and costs.

12 3. Venue is proper in the Northern District of California pursuant to 28 U.S.C. §
13 1391(b), in that the port of arrival of the cargo shipment was Oakland, California, within this
14 Judicial District, and further, that the ground transportation of the Machines also occurred in this
15 District.

16 4. As alleged above, the port of arrival and the interchange of equipment occurred in
17 Oakland, California. This action is therefore properly assigned in the San Francisco or Oakland
18 Division of this Court.

PARTIES:

20 5. Defendant, and Hartford's insured, Lapmaster, is, and was at all relevant times, an
21 Illinois corporation with its principal place of business in Mount Prospect, Illinois.

22 6. Counterclaimant Hartford is, and was at all relevant times, a Connecticut
23 corporation with its principal place of business in Connecticut.

24 7. Hartford is informed and believes and on that basis alleges that Plaintiff and
25 Counterdefendant MDII is, and was at all relevant times, a corporation organized under the laws
26 of Michigan, with its principal place of business in Warren, Michigan.

27 8. Each of the Counter-Defendants was at all relevant times acting as the agent,

1 employee, principal, joint venturer, or partner of such other Defendants, and at all relevant times,
2 was acting within the course and scope of such relationship.

3 **GENERAL ALLEGATIONS**

4 9. Lapmaster sold a Precision Flat Lapping Machine and a Precision Flat Polishing
5 Machine ("the Machines") to Hayward Quartz Technology, Inc.

6 10. The Machines were shipped from Japan by Hamai Co., Ltd. *See Exhibit A.*

7 11. The Machines were transported by Ocean Vessel Cosco Hong Kong from the Port
8 of Yokohama, Japan pursuant to Waybill No. Y05F4451887 and other documents (collectively,
9 the "agreements"). A true and correct copy of Waybill No. Y05f4451887 is attached as Exhibit A
10 and is incorporated by reference.

11 12. The Machines were transported from Japan to the Port of Oakland, California.

12 13. At Oakland, California, Hartford is informed and believes and on that basis alleges
13 that ITG Transportation Services, Inc. ("ITG") and World Express Shipping, Transportation And
14 Forwarding Services, Inc. d/b/a W.E.S.T. Forwarding Services ("West") arranged for motor
15 transport of the Machines from Oakland to Fremont, California.

16 14. The Waybill (Exhibit A) is not a through bill of lading and was not intended to
17 cover the ground transportation of the Machines. The Waybill did not identify MDII, made no
18 reference to a ground transportation carrier, and made no reference to the delivery of the Machines
19 from the Port of Oakland to Hayward Quartz in Fremont, California.

20 15. On or about December 27, 2007, MDII picked up the Machines at the Port of
21 Oakland and began transporting the same to Fremont, California. *See Import Dispatch*, a true and
22 correct copy of which is attached as Exhibit B and incorporated by reference.

23 16. On or about December 27, 2007, MDII negligently, carelessly and recklessly
24 operated and drove their tractor trailer truck so as to cause the tractor trailer truck and Machines,
25 as cargo, to collide with certain overpasses on Interstate 880 in California.

26 17. The negligent, careless and reckless operation of the tractor trailer truck and
27 carriage of the cargo by MDII and its agents proximately caused damage to the Machines, and

1 other damages, losses and expenses.

2 18. Hartford issued an insurance policy to its insured Lapmaster under policy number
3 83 UUQ RZ2879.

4 19. As a result of the collision causing damage to the Machines, Lapmaster filed a
5 claim for loss under the policy with Hartford.

6 20. The policy provided, in pertinent part, that in the event of an insured loss, Hartford
7 would be subrogated to any rights that Lapmaster might have against a third party who is
8 responsible for that loss to the extent of their payments. In addition to contractual subrogation
9 rights, Hartford has rights pursuant to equitable subrogation.

10 21. As a result of the collision, and providing coverage under the policy, Hartford
11 incurred money damages when it compensated or reimbursed and as it is continuing to
12 compensate or reimburse its insured in amounts to be proven at trial, but in no event less than
13 \$820,554.92, the exact amount to be proven at trial.

14 22. In addition to the amounts paid out under the policy, Hartford seeks recovery of
15 prejudgment interest on the liquidated damages to the extent allowed pursuant to California law,
16 including California Civil Code §§ 3287 and 3288.

FIRST COUNTERCLAIM

(Declaratory Relief)

19 23. Counterclaimant incorporates by reference each of its allegations in the paragraphs
20 above.

21 24. An actual controversy has arisen and now exists between Counterclaimant and
22 MDII regarding their respective rights and duties under the agreements referred to above, and
23 specifically, as to MDII's responsibility for the damage to the Machines and other damages, losses
24 and expenses referred to above. Counterclaimant contends, and MDII denies, that Counterclaimant
25 is entitled to compensation from MDII for the damaged or destroyed Machines. Counterclaimant
26 further contends, and MDII denies, that MDII is liable under the agreements and the law of
27 indemnity and contribution, for the other damages, losses and expenses. Counterclaimant requests

1 the following specific relief:

2 (A) A declaration that MDII is liable for all damage to the Machines;

3 (B) That the Carriage of Goods by Sea Act ("COGSA") does not apply to the
4 ground transportation of the Machines from Port of Oakland to Fremont, California;

5 (C) That the Waybill (Exhibit A) is not a "through bill of lading" because 1) it
6 did not contain a "Himalaya Clause" clearly identifying MDII as a covered party, and 2) the
7 Waybill identifies the Port of Oakland as the final destination, not Fremont, California where
8 MDII was transporting the Machines, thus evidencing that the Waybill was not intending to cover
9 the ground transportation or apply to MDII;

10 (D) That MDII's liability is not limited to \$500.00 per Machine because 1) the
11 COGSA does not apply, and 2) Lapmaster was not given a full and fair opportunity to avoid or
12 increase the \$500.00 limitation;

13 (E) That Counterclaimant is entitled under the agreements or applicable law to
14 recover attorneys' fees and costs incurred in defense of MDII's action and in prosecuting these
15 Counterclaims.

16 25. Such a declaration is necessary and appropriate at this time, so that the parties may
17 ascertain their respective rights and duties with respect to the claims asserted by MDII and
18 Counterclaimant, and to avoid a multiplicity of actions.

19 **SECOND COUNTERCLAIM**

20 **(Implied Indemnity)**

21 26. Counterclaimant incorporates by reference each of its allegations in the Paragraphs
22 above.

23 27. Hartford is informed and believes and on that basis alleges that they are entitled to
24 implied indemnity, based on the agreements referred to above and principles of maritime and
25 federal common law. A right to indemnity for the damages, losses and expenses is implied, if not
26 expressed, in the terms of the agreements between the parties.

THIRD COUNTERCLAIM

(Equitable Indemnity)

3 28. Hartford incorporates by reference each of its allegations in Paragraphs above.

4 29. Hartford is entitled to equitable indemnity from MDII under California law, for

5 damages to the Machines and all other damages, losses and expenses incurred by Counterclaimant

6 in connection with the accident alleged above. Counterclaimant is entitled to such equitable

7 indemnity by virtue of the relationship of the parties, in which MDII, as the motor carrier of the

8 Machines from Oakland to Fremont, had control over the cargo and the instrumentalities of

9 delivery, and MDII and its agents or subagents were negligent or otherwise at fault, proximately

10 causing the Machines damage and other damages, losses and expenses alleged above.

FOURTH COUNTERCLAIM

(Negligence)

13 30. Hartford incorporates by reference each of its allegations in Paragraphs above.

14 31. MDII and its employees, agents and subagents had a duty to use reasonable care

15 and take reasonable industry-wide precautions during its transport of the Machine.

16 32. MDII and its agents and subagents were negligent in their transport of the

17 Machines by failing to use reasonable care and take reasonable precautions such as measuring its

18 load and causing the Machines to collide with certain highway overpasses.

19 33. MDII's negligence proximately caused or contributed to the Machines being
20 damaged and the other damages, losses and expenses alleged above.

21 34. Hartford is therefore entitled to recover damages from MDII, as the carrier of the
22 Machines from Oakland to Fremont.

23 35. As a result of providing coverage under the policy, Hartford has incurred, and
24 continues to incur the monetary damages alleged herein, but in no event less than \$820,554.92, an
25 exact amount to be proven at trial.

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FIFTH COUNTERCLAIM

(Negligence Per Se)

36. Counterclaimant alleges and incorporate by reference each and every allegation contained above as though fully set forth herein.

37. On or about December 27, 2007, MDII owed a duty of care, as defined by federal, state and local statutes, rules, codes and regulations, including, but not limited to California Vehicle Code § 35250 (Maximum Vehicle or Load Height).

38. MDII willfully or otherwise breached the duties of care defined by federal, state and local statutes, rules, codes and regulations, all of which were owed to the public and Lapmaster.

39. Lapmaster is in a class sought to be protected by the applicable federal, state and local statutes, rules, codes and regulations, and the type of damages suffered by Counterclaimant are the type of harm sought to be prevented by the applicable federal, state and local statutes, rules, codes and regulations.

40. As a direct and proximate result of MDII's conduct in breaching the duties set forth by the applicable federal, state and local statutes, rules, codes and regulations, Counterclaimant sustained damages in an amount to be proven at the time of trial, but in no event less than \$820,554.92.

41. As a result of the collision, and providing coverage under the policy, Hartford incurred money damages when it compensated or reimbursed and as it is continuing to compensate or reimburse its insured in amounts to be proven at trial, but in no event less than \$820,554.92, the exact amount to be proven at trial.

SIXTH COUNTERCLAIM

(Breach of Bailment Contract)

42. Counterclaimant realleges and reincorporates each and every allegation contained in paragraphs above.

43. At all relevant times herein, Lapmaster owned and entrusted the Machines to MDII

1 for purposes of transporting the Machines from the Port of Oakland to Fremont, California.

2 44. On or about December 27, 2007, Lapmaster entrusted the Machines to MDII.

3 45. MDII picked up the Machines at the Port of Oakland in excellent condition.

4 46. A bailment contract was created with Lapmaster and MDII by virtue of Lapmaster
5 entrusting the Machines to MDII in exchange for payment. MDII accepted possession and custody
6 of the Machines.

7 47. Under the law of bailments, and/or under the terms of the bailment, MDII impliedly
8 and/or expressly promised to deliver the Machines in the same condition as at the time of pickup.

9 48. Hartford is informed and believes and thereon alleges that MDII, on or about
10 December 27, 2007, breached the agreement by, but not limited to, negligently, recklessly,
11 carelessly, wantonly entrusted and/or operated the tractor trailer truck so as to collide and strike an
12 overpass on the 880 Freeway near Oakland, California.

13 49. On or about December 27, 2007, MDII, breached the bailment contract by, but not
14 limited to, failing to deliver the Machines in the same condition as picked up.

15 50. Lapmaster duly performed all conditions, covenants and requirements on its part to
16 be performed in a timely manner or, alternatively, has been excused from such performance on
17 account of MDII's breach.

18 51. As the owner of the Machines, Lapmaster was a beneficiary of the bailment terms,
19 promises, and/or obligations, and is entitled to enforce the bailment promise, whether implied or
20 written.

21 52. As a result of MDII's breach of the bailment agreement, Lapmaster suffered loss
22 when the Machines suffered severe property damage and were eventually declared a total loss.

23 53. As a direct and proximate result of the MDII's conduct in breaching the bailment
24 agreement, Lapmaster sustained damages in an amount to be proven at the time of trial, but in no
25 event less than \$820,554.92.

26 54. Pursuant to the terms and conditions of its policy of insurance with its insured,
27 Hartford has indemnified and paid, and is in the process of indemnifying and paying, Lapmaster

1 for such covered losses in an amount of \$820,554.92, an exact amount to be proven at trial, and
2 thereby has become subrogated to the rights of its insured against these MDII.

3 **SEVENTH COUNTERCLAIM**

4 **(Breach of Transportation Contract)**

5 55. Counterclaimant realleges and incorporates all paragraphs above.

6 56. The matter complained of herein and the liability of MDII is predicated, *inter alia*,
7 upon the transportation of property by MDII under 49 U.S.C. §§ 13702 and 13706, and 49 U.S.C.
8 § 14706.

9 57. On or about December 27, 2007, MDII entered into and accepted a contract for the
10 transport of the Machines from the Port of Oakland, California to Fremont, California. The only
11 documentation for the ground transportation between Oakland and Fremont is an "Import
12 Dispatch," a true and correct copy of which is attached hereto as Exhibit B, and incorporated by
13 reference.

14 58. On or about December 27, 2007, MDII accepted the Machines for transport.

15 59. On or about December 27, 2007, MDII drivers collided with certain overpasses on
16 Interstate 880 near Oakland, California.

17 60. The transportation services rendered were for the benefit Lapmaster.

18 61. Lapmaster was the actual and beneficial owner or legal possessor of the goods and
19 effects for which the transportation services were provided by MDII. In accordance with 49 U.S.C.
20 §§ 13702 and 13706 and 49 U.S.C. § 14706, MDII is obligated to pay for the damages it caused to
21 the Machines.

22 62. Lapmaster has performed all the terms and conditions required.

23 63. Despite the timely demand for reimbursement, MDII refused to pay for the
24 damaged Machines and instead initiated litigation against Lapmaster and Hartford seeking
25 declaratory relief under COGSA.

26 64. MDII is liable pursuant to the terms of the agreement and 49 U.S.C. §§ 13706 and
27 13707, and 49 U.S.C. § 14706.

1 65. Pursuant to the terms and conditions of its policy of insurance with its insured,
2 Hartford has indemnified and paid, and is in the process of indemnifying and paying, Lapmaster
3 for such covered losses in an amount of \$820,554.92, an exact amount to be proven at trial, and
4 thereby has become subrogated to the rights of its insured against these MDII.

5 66. The unpaid amounts owed are liquidated amounts which became due on specified
6 dates; thus, Counterclaimant is entitled to pre-judgment interest on all such obligations from the
7 dates on which they became due through the date of judgment.

8 WHEREFORE, Counterclaimant prays for judgment against the Counterdefendant MDII
9 as follows:

10 A. For the amount of damages resulting from the accident involving the Machines and
11 paid to and/or on behalf of their insured under the policy in the amount of \$820,554.92 and as
12 proven at trial;

13 B. For costs and attorneys fees permitted by law;

14 C. For prejudgment interest as permitted by law, including, but not limited to,
15 California Civil Codes §§ 3287 and 3288; and

16 D. For such other relief as this Court deems just and fair.

DEMAND FOR JURY TRIAL ON COUNTERCLAIMS

18 Hartford hereby demands a jury trial on all Counterclaims for which jury trial is allowed
19 by law.

RATED: April 16, 2008

BAUMAN LOEWE WITT & MAXWELL, PLLC

By: /s/ Christopher J. Brennan

Christopher J. Brennan

Attorneys for Hartford Fire Insurance Company

EXHIBIT A



WAYBILL

(COMBINED TRANSPORT DOCUMENT)

NON-NEGOTIABLE

Shipper

HAMAI CO., LTD.
5-5-15, NISHI-GOTANDA, SHINAGAWA-KU
TOKYO, JAPAN

RECEIVED the goods or the container(s) or package(s) as stated to contain the cargo herein mentioned in apparent good order and condition unless otherwise indicated, to be transported and delivered or transhipped as herein provided.

The receiver, custody, carriage, delivery and transhipping of the goods are subject to the terms and conditions on the face and back hereof, whether written, typed, stamped or printed.

Waybill Number:
YOSF4451887

Consignee

HAYWARD QUARTZ TECHNOLOGY, INC.
1700 CORPORATE WAY FREMONT, CA 94539
TEL: 510-657-9605

Export Reference

Forwarding Agent Reference

140083-4451887
YOSF 4451921 OTI LICENCE 016327N

Notify Party

LAPMASTER INTERNATIONAL
501 W. ALCONQUIN ROAD MOUNT PROSPECT
IL 60056 USA
224-659-7101-224-659-7103

Point and Country of Origin and Destination
JAPAN

NIPPON EXPRESS U.S.A. INC.

SAN FRANCISCO OCEAN CARGO BRANCH

250 UTAH AVENUE, SOUTH SAN FRANCISCO

CA 94080, U.S.A.

PHONE: (650) 827-3100 FAX: (650) 952-0380

Pre-carriges by

YOKOHAMA, JAPAN

Routing of Transportation

Agent Vessel/Voy. No.

0456 Port of Loading
COSCO HONG KONG YOKOHAMA, JAPAN

Final Destination (for the Merchant's reference only)

Port of Discharge

OAKLAND, UNITED STATES

Place of Delivery

OAKLAND, CA, JAPAN

Merchant's reference only

Marks and Numbers
Container No. and Seal No.

HIM-7880-1

LAPMASTER

288F-L

OAKLAND

CASE NO. 1-4

MADE IN JAPAN

HIM-7880-2

LAPMASTER

288F-P

OAKLAND

CASE NO. 1-3

MADE IN JAPAN

(CONTAINER NO) (SEAL NO)

AS PER ATTACHED SHEET

FREIGHT COLLECT AS ARRANGED
SAY FOUR (4) CONTAINERS ONLY.

8460908100561846090810055 846090810053 If Merchant enters a value, the Ad Valorem rate will be charged.

These commodities licensed by U.S. for ultimate destination

Diversion contrary to U.S. Law prohibited

Freight & Charges	R/T	FREIGHT COLLECT AS ARRANGED	Prepaid	Collect

Prepaid at Rate Total Prepaid in Yen	Parable at DESTINATION	Place of Waybill(s) Issue YOKOHAMA, JAPAN	Dated Dec-1 2007
¥109,7100	No. of original Waybill(s) ONE (1)		IS WITNESS WHEREOF, the number of Waybill(s) stated herein, all of the same tenor and date, has been signed.

Laden on board the Vessel essel: COSCO HONG KONG		Date: Dec-1 2007	AS CARRIER, NIPPON EXPRESS U.S.A. (ILLINOIS), INC. NIPPON EXPRESS CO., LTD.
Port of Loading: YOKOHAMA, JAPAN		By:	By: YOKOHAMA M/T 1 TRANSPORT CO.

1. Unless otherwise set out on the face and back hereof, the Goods to be carried are subject to the terms and conditions provided for on the back of the Carrier's Bill of Lading and to the terms of Carrier's applicable tariff, both of which may be seen at the Carrier's office or at those of his authorized agents. Every reference therein to the words "Bill(s) of Lading" shall be read and construed as a reference to the words Non-Negotiable Waybill(s) and the terms and conditions thereof shall be read and construed accordingly, notwithstanding the Clause which requires a surrender of Bill(s) of Lading duly endorsed to the Carrier on delivery of the goods stated in NIPPON EXPRESS U.S.A. (ILLINOIS), INC. Combined Transport Bill of Lading.

In accepting this Waybill, the Shipper agrees to be bound by all stipulations, exceptions, terms and conditions on the face and back of this Waybill and the Carrier's Bill of Lading, whether written, typed, stamped or printed, as fully as if signed by the Shipper, any local custom or privilege to the contrary notwithstanding, and agrees that all agreement or freight engagement for and in connection with the carriage of the Goods are superseded by this Waybill.

2. Except as otherwise specifically provided in this Waybill, delivery of the Goods will be made only to the consignee named on the face hereof, or his authorized agents, on production of proof of identity. Notice of arrival of the goods will, in the absence of other instructions, be sent to the consignee or the person to be notified, by ordinary methods. The Carrier is not liable for non-receipt or delay in the dispatch of such notice.

3. (1) Should the Shipper require delivery elsewhere than the place of delivery or the port of discharge as shown on the face hereof and should written instructions be given by the Shipper to the Carrier or his agents, the Carrier may, at his discretion, deliver the Goods at the place elsewhere than at the place of delivery or the port of discharge as shown on the face hereof.

(2) Should the Consignee require delivery elsewhere than at the place of delivery or the port of discharge as shown on the face hereof and should written instructions given by the Consignee to the Carrier or his agents, the Carrier may, at his discretion, without any notice to the Shipper, deliver the Goods at the place elsewhere than the place of delivery or the port of discharge as shown on the face hereof.

(3) Should delivery be required to be made to a party other than that named as the Consignee, authorization must be given in writing by the Shipper to the Carrier or his agents.

EXHIBIT B

ITG TRANSPORTATION SERVICES, INC.
 1500 EISENHOWER LANE, SUITE 100
 LISLE, ILLINOIS 60532
 TELEPHONE 630-725-4650 FAX 630-725-4699
AFTER 5:00P.M. AND WEEKENDS, PLEASE USE 24 HR EMERGENCY # 630-209-4649
 PROFILE#: QUOTE #:

IMPORT DISPATCH

DATE: 12/21/07 ITG REF #: 8010284/85/86/88

BOOKING/BL#: COSU100083390

VENDOR NAME: MASON DIXON - *Jesse*

VENDOR PH: 510-433-1020 FX 510-433-1025

SSL: COSCO	EQUIP: 2X40' STANDARD & 2 FLAT RACKS (IN GUAGE)
TOFC/COFC/SPEQ: TOFC	
HAZ(Y/N): N	DEC ATTACHED (Y/N): N

UNIT (INITIAL & NUMBER): CBHU610576-2 (40' STD) // CLHU373710-1 (20' STD) //
 TRIU060411-1 (1X20' FLAT RACK) // TRIU063007-0 (1X20' FLAT RACK)
 CHASSIS PICK UP: SSA TERM & COSCO

ORIGIN: SSA TERMINALS	RAIL PICKUP #: D/O ATTACHED
	LPD: 12/21/07

CONTACT: 1717 MIDDLE HARBOR ROAD	PHONE: 510-891-2922
CNTR YARD - 510.238.4400	
OAKLAND CA	

APPOINTMENT DATE: ** PLS PULL BOTH 1X20' STD & 1X40' STD TODAY 12/21 AND
 DROP TODAY - ASAP //// PLS PULL BOTH FLAT RACKS ON WEDNESDAY 12/26 AND
 DROP BY 1PM ****RIGGERS ARE HIRED FOR THE FLAT RACKS

DROP/LIVE (D/L): D

DEST: HAYWARD QUARTZ TECHNOLOGY LOAD REF:	
CONTACT: RCVNG	PHONE: 510-657-9605
1700 CORPORATE WAY	

FREMONT CA 94539

EMPTY CNTR RETURN: SSA TERM & COSCO	c/o SSL: COSCO
CHASSIS RETURN: SSA TERM & COSCO	

DRIVER MUST BE ON TIME!! ANY DELAYS MUST BE REPORTED TO ITG IMMEDIATELY!!!!
 ITG WILL NOT BE RESPONSIBLE FOR ANY ACCESSORIALS NOT APPROVED AT TIME OF MOVE.
 IF AFTER HOURS, PLEASE CALL THE 24 HOUR EMERGENCY NUMBER ABOVE.

DETENTION CHARGES REQUIRE SIGNED PROOF OF DELIVERY RECEIPT WITH IN/OUT TIMES.

CHASSIS SPLIT CHARGES MUST BE BILLED DIRECTLY TO THE ABOVE STEAMSHIP LINE.

ANY DEVIATION FROM THIS WORK ORDER MUST BE AUTHORIZED BY ITG IN WRITING!

SENT BY: SHERRY X 4677

01/11/2008 12:24 5104331026

MDII OAK

PAGE 02

MASON DIXON INTERMODAL, INC.Oakland Terminal Stockton Terminal Fresno Terminal
510-433-1020 209-941-0644 559-275-5400

SHIPPER:

Inv #: 9470-009538-0
Appt. time: ASA

CONSIGNEE/RECEIVER: Container Line: COSCO

HAYWARD QUARTZ TECHNOLOGY**1700 CORPORATE WAY****FREMONT****510-657-9605**

DATE	PO#	CONTR/TRAILER#	R/R
12/27/2007		TRIU 0604111	OAKLAND
NO. OF PKGS.	DESCRIPTION OF COMMODITIES	WEIGHT	
T/L	F.A.K.		
Appt #:	SPOT LOCATION		
Appt Conf. #:	Booking #		
Directions:			
880S, EXIT MISSION BLVD<, WARM SPRINGS BLVD<, CORPORATE WAY>			

SEAL INTACT #

It is your obligation to notify dispatch when the trailer is available for pickup. MDII will not guarantee the pickup of an empty trailer on same day if not called in to dispatch before 2:30 p.m. This trailer is hauled by an independent contractor/owner operator. The contractor is not an employee of MDII. MDII is not responsible for damages, losses, etc. that may occur on your property. Acceptance of this "Delivery Receipt" is your acknowledgment to hold harmless MDII for any damages, losses, etc. that may occur from the delivery or pickup of this trailer or container.

NOTICE: This is a use controlled trailer with limited "free time." You must accept delivery within 48 hours and release back to us within 48 hours if you are to avoid additional charges. Drivers are required to advance bill and remittance charges on your behalf and are permitted to recover these charges from you pursuant to Civil Code §62197. You may request our dispatch operations to have the driver stay with the load and will have to pay for any time in excess of two hours. If you request that our driver unload, you have no free time and will be billed for his services from the time of arrival until departure. Signature of your company representative on this receipt verifies the time and date of the trailer receipt; trailer and contents in good condition and seal intact; driver's time of arrival and departure, and acknowledges liability for all trucking and associated charges. Failure to pay billed charges will result in a lien on shipments including the costs of storage and appropriate security pursuant to Civil Code §62051.5.

DELIVERED BY	DATE	TIME IN	TIME OUT	RECEIVED IN GOOD ORDER BY CONSIGNEE	DATE
gusardo					

These charges include (1) fees to pay for regulation of transportation companies by the California Public Utilities Commission and (2) taxes paid to California cities instead of excise or business license taxes they could otherwise impose

I.C.C. AND P.U.C. REQUIRE PAYMENT OF FREIGHT CHARGES WITHIN SEVEN DAYS.

01/11/2008 12:24 5104331026

MDII OAK

PAGE 03

MASON DIXON INTERMODAL, INC.

Oakland Terminal Stockton Terminal Fresno Terminal
510-433-1020 209-941-0644 559-275-5400

SHIPPER:

CONSIGNEE/RECEIVER: Container Line: **COSCO**Inv #: **9470-009539-8** Appt. time: **ASA**

Railroad PIU #:

HAYWARD QUARTZ TECHNOLOGY**1700 CORPORATE WAY****FREMONT 510-657-9605**DATE
12/27/2007

P.O. #

CONTR./TRAILER#
TRIU 0630070

R/R

OAKLAND

NO. OF PKGS.	DESCRIPTION OF COMMODITIES	WEIGHT
T/L	F.A.K.	
	Appt #:	SPOT LOCATION
	Appt Conf. #:	Booking #

Directions:

880S, EXIT MISSION BLVD<, WARM SPRINGS BLVD<, CORPORATE WAY>

SEAL INTACT #

It is your obligation to notify dispatch when the trailer is available for pickup. MDII will not guarantee the pickup of an empty trailer on same day if not called in to dispatch before 2:00 p.m. This trailer is hauled by an independent contractor/owner operator. The contractor is not an employee of MDII. MDII is not responsible for damages, losses, etc. that may occur on your property. Acceptance of this "Delivery Receipt" is your acknowledgement to hold harmless MDII for any damages, losses, etc. that may occur from the delivery or pickup of this trailer or container.

NOTICE: This is a time controlled trailer with limited "free time." You must accept delivery within 48 hours and release back to us within 48 hours if you are to avoid additional charges. Truckers are required to advance rail and steamship charges on your behalf and are permitted to recover these charges from you pursuant to Civil Code §2167. You may request our dispatch operations to have the driver stay with the load and will have to pay for any time "in-excess" of two hours. If you request that our driver unload, you have no free time and will be billed for his services from the time of arrival until departure. Signature of your company representative on this receipt verifies the time and date of the trailer receipt; trailer and contents in good condition and seal intact; driver's time of arrival and departure, and acknowledges liability for all trucking and associated charges. Failure to pay billed charges will result in a lien on shipments including the costs of storage and appropriate security pursuant to Civil Code §2051.5.

DELIVERED BY	DATE	TIME IN	TIME OUT	RECEIVED IN GOOD ORDER BY CONSIGNEE	DATE
iguajardo					

These charges include (1) fees to pay for regulation of transportation companies by the California Public Utilities Commission and (2) taxes paid to California cities instead of excise or business license taxes they could otherwise impose".

I.C.C. AND P.U.C. REQUIRE PAYMENT OF FREIGHT CHARGES WITHIN SEVEN DAYS.

PROOF OF SERVICE

I, Cheryl L. Solomine, declare as follows:

I am employed with the law firm of Bauman Loewe, Witt & Maxwell, P.L.L.C., whose address is 8765 E. Bell Road, Suite 204, Scottsdale, AZ 85260. I am over the age of eighteen years, and am not a party to this action.

On April 16, 2008, I emailed the foregoing document described as follows:

ANSWER OF DEFENDANT HARTFORD FIRE INSURANCE COMPANY ERRONEOUSLY SUED AS
HARTFORD INSURANCE CO., TO MASON AND DIXON INTERMODAL, INC'S COMPLAINT FOR
DECLARATORY JUDGMENT; AND HARTFORD FIRE INSURANCE COMPANY'S COUNTERCLAIMS
AGAINST MASON AND DIXON INTERMODAL, INC

on the interested parties in this action by:

Service was made by email to the following:

Vincent Castillo
Lombardi, Loper & Conant, LLP
Lake Merritt Plaza
1999 Harrison Street, Suite 2500
Oakland, CA 94612
vc@llcllp.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 16, 2008, at Scottsdale, Arizona.

Cheryl L. Solomine
Cheryl L. Solomine